Who Speaks in the Name of the People?

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Ioanna Tourkochoriti So 6 Nov 2016

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The attacks by part of the press in the UK upon the decision controlling the limits of the executive power in reference to the supposed “legitimacy” offered by the referendum in favor of leaving the EU is a dangerous practice from the perspective of the rule of law. The people are the “sleeping sovereign” as Richard Tuck has recently noted (Richard Tuck, *The Sleeping Sovereign*, Cambridge University Press 2016). As such, the people should be given the opportunity to “wake up” periodically and to express themselves in referenda. The government *lato sensu*, which includes all state institutions that speak in the name of the “sovereign” people, the executive, the legislative and the judiciary, must respect the people’s wishes. Part of the government is also the judiciary, who in this case has spoken in the name of the people and they have reminded them that an important part of their rights are at stake in the decision to exit the EU. The separation of powers and the institution of checks and balances are there to remind the people of elements concerning their coexistence as citizens within the state that were forgotten or overlooked in the process of majority decision-making. In our conception of collaborative constitutionalism (as Aileen Kavanagh has noted recently in “Beyond Silence and Censure in the Collaborative Constitution”, *Symposium on Constitutional Silence*, Trinity College Dublin August 2016) Courts are contributing their own insights on aspects of the public debate that must be taken seriously. In this case the judges reminded the people that significant categories of rights are at stake that the people will lose upon withdrawal from the European Union (R (Miller) v. Secretary of State for Exiting the EU § 64, 66). These rights came into effect with the enactment of the European Communities Act 1972 in a way that cannot be undone by the exercise of Crown prerogative power (R (Miller) v. Secretary of State for Exiting the EU § 92).

Justifying unlimited powers for the executive in reference to democratic legitimacy obtained through plebiscites was the mode of governance of numerous dictators in history, most interestingly and relevant for this case Napoleon. Napoleon came to power managing to take advantage of the impasses to which the French Revolution had led. The French revolution did not succeed in guaranteeing effective liberty for all. External enemies and internal debts contributed to its instability. As the historian Albert Sorel noted (Albert Sorel, *L’Europe et la Révolution Française*, *VI La Trève Luneville et Amiens 1800-1805* , Paris, Plon 1903, pp. 3-4), Napoleon succeeded in persuading that he was the authentic incarnation of the French revolution and that he was able to deliver the promises of the revolution. He inherited the ambition to govern the revolution (François Furet, “Bonaparte”, in François Furet and Mona Ozouf dir. *Dictionnaire Critique de la Révolution Française*, *Acteurs*, p. 58) and especially the ambition to realize the promise of equality. He assumed the mission to discover what was real and possible among the principles of the French Revolution and what is purely speculative and hypothetical and thus unrealizable.

As Hegel famously noted, the level of abstraction and the claim of the French revolutionaries and in particular the Jacobins to shape reality in conformity to abstract ideas could only lead to the Terror, the fury of destruction of reality, which does not correspond to the vision of the absolute conscience (G.F.Hegel, *Phänomenologie des Geistes*, H, 533-534, fr. transl. by Bernard Bourgeois, *Phénoménologie de l’Esprit*, “ La liberté absolue et la Terreur ”, Paris, Vrin 2006, p. 502). Hegel’s scheme posed on the conception of thesis, antithesis and synthesis can help us understand how Napoleon would offer a synthesis that would assure life and stability in France at the time. The formality of the proclamation of liberty during the French Revolution (thesis) was negated by the Terror which too place in the name of realizing this abstract liberty (antithesis). This lead to a new synthesis: the absorption of liberty in the regime of Bonaparte. The proclamation of liberty during the French Revolution was negated by the Terror. A new type of government would help protect some liberty in a way that would guarantee stability was the only realistic solution of government at the time. Napoleon offered the civil code, necessary at the time to facilitate the transactions of the emerging bourgeoisie. At the same time he ruled like a plebiscitarian monarch who would protect some liberty.

Shortly after the coup of 19 Brumaire Napoleon held a plebiscite to enact the Constitution if the year VIII. This Constitution created an executive power composed by three Consuls among whom he would be the first. Napoleon used the plebiscite to obtain legitimacy that he needed for this fundamental law, which made him extremely popular. Nevertheless he ruled like a Monarch who exercised power in a much more authoritarian way than the kings of the Ancien Regime (see François Furet, “Bonaparte”, 65). And he had the best possible excuse for ruling as such a monarch: direct mandate from the people. No effective separation of powers existed in France at the time. Napoleon created the first version of the current Conseil d’Etat which was an evolution of the previous royal councils and which was the laboratory of laws. Regular legislation was prepared by the Conseil d’Etat. The Legislative Body was used to vote laws without discussing them (Albert Sorel, supra p. 5). Under the facade of respecting popular sovereignty he succeeded in establishing himself as Consul for life by using a plebiscite in 1802 again in which the people approved the Constitution of year X. His nephew Napoleon III also declared himself emperor of France in 1851 and legitimated his accession with a plebiscite.

The decision of the High Court in *R (Miller) v. Secretary of State for Exiting the EU* reminded everybody that the way the government will speak in the name of the people must respect the constitutional order and primarily the rights of the people themselves. As the practice of Napoleon shows, there is a very fine line between speaking in the name of the people and instrumentalising the people. There is a very fine line between conducting a consultative referendum, often morally required in a democratic regime and using the referendum as an instrument at the hands of the executive to exercise power in a way that does not protect people’s rights. The courts as an institution of the state that also speaks in the name of the people, reminded that the protection of important rights of the people is at stake. This means that any alteration of the legal status of these rights must be done accordingly to what the constitutional structure foresees, that is through a law enacted by the Parliament. The High Court reminded the people “the powerful constitutional principle that the Crown has no power to alter the law of the land by use of its prerogative powers” (*R (Miller) v. Secretary of State for Exiting the EU* § 86). For the High Court the European Communities Act 1972 has the status of a “constitutional Statue, which means that Parliament is taken to have made it exempt from the operation of the usual doctrine of implied repeal by enactment of later inconsistent legislation” (*R (Miller) v. Secretary of State for Exiting the EU* § 88). By doing so it merely expressed a principle which is common in the constitutional traditions of many European states that changes in the status of rights are to be made by a formal act of a law which presupposes lengthy deliberation and consideration of the wider implications that these changes of status can have. Even if there can be disagreement on the substantive part of the High Court’s judgment among UK Constitutional Law experts, there can be no doubt on the legitimacy of the Court decision itself.

The practice of using a referendum to justify the power of the executive has been used and abused throughout history. Napoleon who ruled like a plebiscitarian monarch can serve as the best counter example for contemporary liberal democratic regimes. All the institutions of the government, the executive, the parliament and the judiciary speak in the name of the people in our conception of the western democratic constitutionalism. It is only thanks to the checks and balances that the separation of powers provides in a conception of collaborative constitutionalism that we can avoid practices of misusing references to a supposed democratic legitimacy in view of derailing the operations of the government in a direction that is entirely out of control of democracy itself.

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